53787

ROY G. ROWLEN and ADA L. ROWLEN, Plaintiffs and Counterdefendants-Appellees, v. MILTON M. HERMANN and MILDRED L. HERMANN, Defendants and Counterplaintiffs-Appellants.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Nathan M. Cohen, Presiding.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

The facts alleged in the pleadings in this partition action are given in detail in the companion case of Hermann et al. v. Rowlen et al., App. Ct. #53387, filed today. Suffice it to say, for purposes of this opinion, that Roy G. Rowlen and Ada L. Rowlen, his wife, filed a verified complaint seeking partition of improved real estate located in Cook County, Illinois, alleging common ownership in the property--tenancy in common--in fee simple absolute in themselves (an undivided 1/3 interest in joint tenancy) and in Milton M. Hermann and his wife, Mildred L. Hermann (an undivided 2/3 interest in joint tenancy). The Hermanns were named as the only defendants, and the complaint contained an allegation that no other defendant or person had any right, title or interest in and to the title to the real property.

The complaint, further alleging that the Rowlens were in possession of the premises and had paid all the real estate taxes, concluded with a prayer for partition in kind or a judicial sale of the land and a division of the proceeds according to the respective interests of the parties in the land; for apportionment, among all the parties to the suit, of the attorney's fees incurred by the plaintiffs; and for such other and further relief as equity may require and that the court shall seem meet.

The defendants filed both a verified answer and a verified amended counterclaim. The counterclaim sought a partition and an accounting for rents which purportedly had accrued during the time that Roy G. Rowlen individually and he and his wife together had used and occupied the premises to the exclusion of the other cotenants. This pleading also prayed that reasonable attorney's fees for counsel retained by the Hermanns be apportioned among all the parties to the action.

In their answer, the Hermanns admitted that the Rowlens were in possession of the premises and repeated the allegations contained in their counterclaim regarding the accrued rents purportedly owed them. The answer also denied that attorney's fees incurred by the plaintiffs should be apportioned among all the parties because the complaint, prepared by counsel retained by the Rowlens, purportedly failed to set forth the rights and interests of all the parties interested in the land as required by the Partition Act--Ill. Rev. Stat. (1967), ch. 106, §45. It therefore became necessary for the defendants to employ their own counsel to properly set forth the rights of all the parties in interest which was allegedly done for the first time in the amended counterclaim prepared by counsel retained by the Hermanns. However, both the amended counterclaim and the answer, filed by the Hermanns, admitted that the complaint properly alleged, in correct proportion, the common ownership in the land enjoyed by the Rowlens and the Hermanns.

The Rowlens filed an answer to the amended counterclaim and a reply to the answer filed by the Hermanns. Both the answer and the reply denied that the Hermanns were entitled to any accrued rents. The reply, however, was more detailed on this issue. It alleged that, prior to his remarriage, Roy G. Rowlen had conveyed the property involved herein to himself and to

Mildred L. Hermann and Albert F. Marshalek, now deceased, in joint tenancy; that Mildred L. Hermann and Albert F. Marshalek were not children of Roy G. Rowlen nor his heirs at law nor related to him in any manner, nor did they, jointly or severally, pay him any consideration for his conveyance but that he conveyed the property to them and to himself in joint tenancy with the intention that, at his death, the property would descend to them by operation of law; that Roy G. Rowlen never intended that he should ever pay any rent or compensation for the use and occupancy of the premises during his lifetime and that both Mrs. Hermann and Mr. Marshalek were fully aware of this intention at the time of the conveyance to them.

Continuing, the reply alleged that Roy G. Rowlen and his first wife, now deceased, bought the land in joint tenancy, maintained and improved the premises without any contribution from Mrs. Hermann or Mr. Marshalek, and that after the death of Mr. Rowlen's first wife and before his subsequent remarriage to Ada L. Rowlen, Albert F. Marshalek occupied the premises with Rowlen, but voluntarily moved out after the marriage; that neither the decedent, Albert F. Marshalek, nor the defendants, Milton M. Hermann and Mildred L. Hermann, ever paid any allocated share of the real estate taxes nor any other expenses related to the maintenance, care, repair or improvement of the premises following the acquisition of their interests in joint tenancy but rather Roy G. Rowlen alone has always paid these expenses; and that in equity and good conscience there is no rent due and payable from the Rowlens to the Hermanns. The reply also denied that the complaint failed to properly set forth the rights and interests of all the parties interested in the land and prayed that the relief sought in the complaint be granted to the plaintiffs.

Thereafter, the trial court entered a decree for partition

adopting the allegations in the complaint as to the co-ownership and division of title in the land finding this to be admitted by the defendants in their pleadings. The court reserved the question of accrued rents for consideration at a future date.

The commissioner appraised the property--improved with a 5-room brick ranch bungalow with three bedrooms, full basement with recreation room, and a two-car frame garage--at $28,000 and advised the court that there could be no partition in kind without manifest prejudice to the interested parties. Subsequently, the court entered a decree of sale, and the property was sold at the sheriff's sale to the defendants, the Hermanns, for $24,300 which was the highest bid. The court confirmed the sheriff's report of sale and ordered that a sheriff's deed be issued to the Hermanns, in joint tenancy, when they deposited the balance of the purchase price with the sheriff.

After the court had confirmed the sheriff's report of sale, but before it had entered its order of distribution of the sale proceeds, the defendants filed two petitions on two separate occasions. The initial petition alleged that the defendants had just learned that Northern Illinois Gas Company had a security interest in the plaintiffs' one-third interest in the proceeds of the sale by virtue of its security agreement with the plaintiffs for the purchase of certain air conditioning fixtures installed by the gas company on the premises and prayed that the court grant the defendants leave to file an amendment to their answer and counterclaim, joining the Northern Illinois Gas Company as an additional party counterdefendant. It was alleged that the gas company was a necessary party defendant to this action by virtue of its purported interest in the real estate.

Thereafter, the plaintiffs filed, in open court, a waiver of lien from the Northern Illinois Gas Company given in exchange

for an assignment of the plaintiffs' interest in the proceeds of the partition sale to the extent of $1,411.22 and the court, on motion of the plaintiffs, dismissed the petition of the defendants which sought to add the gas company as an additional necessary party defendant.

Approximately three weeks later, the defendants filed their verified petition for change of venue alleging that they could not receive a fair trial because of the prejudice of the trial court judge and that this first came to their knowledge within less than ten days of the presentation of their petition. The court entered an order denying their petition because it was not timely filed.

Subsequently, testimony was heard on the issues of accrued rents, enhancement value of the premises due to the installation of central air conditioning equipment in the house which was paid for solely by Mr. Rowlen, and apportionment of the plaintiffs' reasonable attorney's fees among all the parties to the partition action. The court found that the defendants were not entitled to any accrued rents from the plaintiffs because the equities were with Mr. Rowlen; that the value of the premises was increased by $1,300 due to the installation of the central air conditioning system and that, as a result, the defendants owed the plaintiffs two-thirds of this amount; and that the plaintiffs' reasonable attorney's fees, in the amount of $3,250 were to be apportioned among all the parties to this litigation. The court entered its order of distribution of the proceeds from the sheriff's sale to this effect.

The defendants appeal contending that the trial court erred in: (1) denying their petition for change of venue which was filed before trial, without any objection to its form or sufficiency and without a showing that any delay was sought by it; (2) denying their counterclaim for accrued rents since the

Joint Rights and Obligations Act [Ill. Rev. Stat. (1967), ch. 76, §5] requires a tenant in common using real estate in a proportion greater than his interest to compensate his cotenants for his greater use; (3) granting the plaintiffs any sum as to the enhancement value of the premises due to the installation of a central air conditioning system done at the expense of Mr. Rowlen since the plaintiffs did not ask for this specific relief in their complaint for partition and the evidence introduced in their behalf on this point of increased valuation was based upon hearsay and speculation; and (4) apportioning plaintiffs' attorney's fees among all the parties in interest, since the partition complaint failed to set up the interests of all the parties interested in the property.

As to the change of venue point, the defendants properly assert the law to be that when a verified petition for change of venue is presented in proper form and in apt time, the trial court judge has no discretion but must, without further inquiry, grant the change of venue, which is actually a substitution of judges. If the trial court erroneously denies a proper petition for change of venue, all subsequent orders are void and a nullity. Yedor v. Chicago City Bank & Trust Co., 323 Ill. App. 42, 58-59, 54 N.E. 2d 728, 735-36 (1944); Cory Corp. v. Fitzgerald, 335 Ill. App. 579, 588, 82 N.E. 2d 485, 489 (1948). However, if a petition for change of venue is filed only after a trial court judge has ruled on a substantive issue in the case, it comes too late and is properly denied, thereby preventing litigants from "forum-shopping" after they have tested the attitude of the trial court judge and perhaps found it to be adverse to their position as to a substantive issue in the cause. City of Chicago v. Hamlin, 24 Ill. 2d 148, 180 N.E. 2d 473 (1962); Hildebrand v. Hildebrand, 41 Ill. 2d 87, 242 N.E. 2d 145 (1968); Miller v. Miller, 94 Ill. App. 2d 138, 236 N.E. 2d 321 (1968). This

established rule of law is recognized in the only case cited by the defendants in support of their position, In Re Estate of Wakefield, 77 Ill. App. 2d 128, 221 N.E. 2d 788 (1966), but was not applied there because the reviewing court in that case held that the petition was filed before the court had ruled on any substantive issue and was therefore erroneously denied.

We find no abuse of discretion in the instant case, however, when the trial court denied defendants' petition for change of venue. This petition was filed approximately three weeks after the court had denied defendants' earlier petition seeking to add the Northern Illinois Gas Company as an additional necessary party defendant. Section 46 of the Partition Act [Ill. Rev. Stat. (1967), ch. 106, §46] requires that every person having any interest, whether in possession or otherwise, who is not a plaintiff shall be made a defendant to such complaint. The Partition Act itself therefore specifies who are necessary party defendants so that complete justice can be done in a court of equity. The proper joinder of necessary party defendants is also important from the standpoint of aiding the court in its later decree for partition as well as assisting purchasers at any subsequent partition sale so that their purchase will be made with full knowledge of any existing liens on the property. This section of the Partition Act is therefore substantive, as it goes to the relief sought in such a proceeding. The defendants, by their petition seeking to add the Northern Illinois Gas Company as an additional necessary party defendant, sought relief on a substantive issue in this cause.

Furthermore, this ruling of the trial court, regarding the gas company, also involved an additional substantive issue in the partition proceedings because section 68 of the Partition Act [Ill. Rev. Stat. (1967), ch. 106, §68] permits the apportionment of reasonable attorney's fees incurred by the plaintiff

among all the parties to the cause only if the rights and interests of all the parties in interest are properly set forth in the complaint assuming that the defendants, or some of them, have not interposed a good and substantial defense to the complaint, which did not occur in the instant case. Harrison v. Kamp, 403 Ill. 542, 87 N.E. 2d 631 (1949). The plaintiffs asked for this apportionment of reasonable attorney's fees in their partition complaint and, when the trial court denied defendants' petition seeking the addition of Northern Illinois Gas Company as an additional necessary party defendant, the lower court implicitly ruled that the plaintiffs had properly joined all other necessary parties as defendants. It was only after receiving this adverse ruling, on a substantive issue, that the defendants filed a petition for change of venue. In our opinion, it came too late in the proceedings, and the trial court properly denied it.

Moreover, the trial court had earlier denied defendants' motion to dismiss the partition complaint for failure to join all necessary parties as defendants. This motion was based upon the alleged failure of the complaint to join, as defendants, the heirs of the deceased joint tenant, Albert F. Marshalek, since accrued rents were purportedly owed by the Rowlens to these heirs and an accounting should necessarily follow. This particular issue was decided adversely to the defendants in the companion case of Hermann et al. v. Rowlen et al., App. Ct. #53387 filed today. In Booth v. Metropolitan Sanitary Dist., 79 Ill. App. 2d 310, 314, 224 N.E. 2d 591, 593 (1967), it was held that the trial court did not abuse its discretion in denying a motion for change of venue when it was presented after the court had ruled on a motion to dismiss. The same rule would be applicable to the case at bar. We find no error here.

On the issue of accrued rents, the defendants do not

raise a manifest weight argument as to the finding of the trial court that the equities are with the plaintiffs and that therefore no accrued rents are owing to the defendants. Instead they rely upon section 5 of the Joint Rights and Obligation Act [Ill. Rev. Stat. (1967), ch. 76, §5] which provides, inter alia, that when one or more tenants in common in real estate shall take and use the profits or benefits thereof in greater proportion than his interest, he shall account therefor to his cotenants jointly or severally.

Such reliance overlooks the fact that section 44 of the Partition Act [Ill. Rev. Stat. (1967), ch. 106, §44] specifies that partition shall be an equitable remedy as it is a proceeding in chancery. Pierce v. Pierce, 351 Ill. App. 336, 115 N.E. 2d 107 (1953); affrm'd. 4 Ill. 2d 497, 123 N.E. 2d 511 (1955). Indeed, it has been held that chancery has traditionally enjoyed concurrent jurisdiction in partition proceedings and will continue to do so even independent of the Partition Act. Pierce v. Pierce, 4 Ill. 2d 497, 123 N.E. 2d 511 (1955).

In the case at bar, it is manifestly clear that the equities are with the plaintiffs. The evidence supports the allegations contained in the reply of the plaintiffs to the answer filed by the defendants. From the testimony of Mr. Rowlen and Mrs. Hermann, it is uncontradicted that Rowlen purchased this improved property with his own funds; always paid the real estate taxes, insurance, and repairs without any contribution from the defendants; conveyed the premises to the decedent, Albert F. Marshalek, and to the defendant, Mrs. Hermann, in joint tenancy with himself, at his own urging receiving no consideration in return but executing the conveyance so that these two other people, his stepson and his stepdaughter respectively, could take the land by operation of law if he predeceased them; and rent was never sought from him until he remarried and the Hermanns

filed their counterclaim seeking an accounting for allegedly accrued rents. The defendants do not attack the sufficiency of the evidence in this appeal. In our opinion, the trial court properly held that the equities were with the plaintiffs and that no accrued rents were owing to the defendants so there was no duty to account.

In their third contention, the defendants implicitly recognize the general rule that when one co-owner pays for a permanent improvement which forms a part of jointly-held real estate, does so without the knowledge or consent of his co-owners, and the premises later have to be sold in a partition sale, he is given an allowance by the court, upon proper proof, and paid to him by his co-owners in proportion to their share in the property, equal to, not the cost of the permanent improvement, but rather the increase in the fair market value of real property due to this improvement. Cooter v. Dearborn, 115 Ill. 509, 518, 4 N.E. 388, 393 (1886); Clarke v. Clarke, 349 Ill. 642, 649, 183 N.E. 13, 16 (1932); David v. Schiltz, 415 Ill. 545, 555-57, 114 N.E. 2d 691, 697-98 (1953). The defendants urge, however, that the trial court erred in granting this allowance because the plaintiffs did not seek such specific relief in their complaint and because the expert witness called by them to prove the amount of the increase in the valuation of the property due to the addition of the central air conditioning system gave his opinion based upon hearsay and speculation.

As to the pleading point, we note that the complaint for partition contained a prayer for general relief from the court and that it correctly stated the rights and interests of all the parties interested in the property as required by the Partition Act. In Scott v. Bassett, 71 Ill. App. 641 (1897), the reviewing court upheld the action of the trial court in

granting specific relief in an equitable proceeding for partition when the pleading contained only a prayer for general relief but properly joined all necessary party defendants. In our opinion, the prayer for general relief in this case enabled the court to pass on the issue of enhancement value which, after all, is a relevant consideration when, in an equitable proceeding, the court is seeking to do complete justice among all the co-owners.

As for the evidence issue, the two cases relied upon by the defendants, Trustees of Schools v. Kirane, 5 Ill. 2d 64, 124 N.E. 2d 886 (1955) and Buis v. Peabody Coal Co., 41 Ill. App. 2d 317 190 N.E. 2d 507 (1963), concern themselves with the proper prove-up of property valuations before a jury in actions brought at law for the recovery of money damages. The instant case, on the other hand, is a proceeding in equity, not tried before a jury, and with proof as to enhancement value being allowed so as to effect complete justice among the co-owners. It is obvious to us that the installation of central air conditioning would increase the fair market value of any property with the only issue being the dollar amount of this increase. In this case, the enhancement value figure of $1,300, with two-thirds of this figure being charged to the defendants since they have a two-thirds interest in the property, is a reasonable and not excessive figure in light of the appraised value of the house placed upon it by an impartial commissioner and its selling price at the partition sale. We find no reversible error here.

Finally, the defendants contend that the trial court erred in apportioning the attorney's fees incurred by the plaintiffs among all the parties to the suit. The reasonableness of the fees allowed by the trial court to the attorney for the plaintiffs is not involved in this appeal. However, the defendants do urge that they should not have to pay their proportionate share of these fees because the plaintiffs' attorney did not

join all necessary party defendants to the complaint for partition. In the companion case of Hermann et al. v. Rowlen et al., App. Ct. #53387, filed today, we held that the heirs of the deceased joint tenant, Albert S. Marshalek, were not proper party defendants to this partition action on the issue of accrued rents, and in this opinion, we have held that the equities were with the plaintiffs and they owed no accrued rents to the defendants. In our opinion, the issue of accrued rents is now properly removed from this case and was not raised by the defendants in good faith.

The defendants urge that the Northern Illinois Gas Company was a necessary party defendant to this partition action by virtue of their purported security interest in the land, that the court erred in denying their petition to join the gas company as party defendant, and that the plaintiffs are not entitled to apportionment of their attorney's fees because their attorneys did not properly set forth the interests of all the parties to the premises as required by section 46 of the Partition Act. [Ill. Rev. Stat. (1967), ch. 106, §46].

This contention assumes that the central air conditioning system is a fixture and that the gas company's security interest therein, before it was waived, was consequently a lien on the land. We do not agree. Included in the record before us is the Retail Installment Contract executed by Roy Rowlen as the buyer, Stachnik's Automatic Heating as the seller, and assigned thereafter by the seller to the Northern Illinois Gas Company. The contract identifies one air conditioner, one coil, one furnace, and one thermostat (all completely installed) as the subject matter of the contract and goes on to say:

> "Seller, to secure performance by Buyer of the terms and conditions herein set forth, shall have a security interest in such Goods and any accessions thereto and proceeds thereof.
>
> "It is the intention of Buyer and Seller that the

> Goods are to remain personal property at all times and are not to be affixed to any real estate so as to become fixtures on such real estate. . . ."

In Sword v. Low, 122 Ill. 487, 13 N.E. 826 (1887), it was recognized that preeminence is given to the intention of the parties as to whether a particular item is personal property or a fixture. The court went on to state at 122 Ill. 487, 497, 13 N.E. 826, 829:

> "There seems to be a great unanimity in the authorities that things personal in their nature may retain their character of personalty by the express agreement of the parties, although attached to the realty in such manner as that, without such agreement, they would lose that character, provided they are so attached that they may be removed without material injury of the article itself or of the freehold. It is not held that parties may by contract make personal property real or personal at will, but that where an article personal in its nature is so attached to the realty that it can be removed without material injury to it or to the realty, the intention with which it is attached will govern; and if there is an express agreement that it shall remain personal property, . . . it will be held to have retained its personal character."

In the instant case, the assignee--Northern Illinois Gas Company--had no better rights than its assignor--Stachnik's Automatic Heating. The parties to the Retail Installment Contract expressly agreed that the central air conditioning system was to remain personal property and was not to be so affixed to the real estate as to become fixtures. This was their expressed intention. The defendants presented no evidence by way of cross-examination of the plaintiffs' expert witness, a real estate broker and appraiser, or direct examination of their own expert witness, another real estate broker and appraiser, both of whom had physically examined the inside and outside of the house, as to whether the central air conditioning system was so affixed to the real estate as to be a fixture or if it could be removed without material injury to the freehold or itself. It is our opinion that the central air conditioning system in this case is personal property and not a fixture. Any lien which

Northern Illinois Gas Company had by virtue of their security interest was therefore not a lien on the real estate but was in the nature of a chattel mortgage on personal property--the central air conditioning equipment.

This equipment was personal property belonging to and owned by Mr. Rowlen. He did not remove it from the premises at the time of the partition sale but permitted it to be sold with the house as a permanent improvement. The defendants did not object to this but rather purchased it along with the house at the judicial sale. There is therefore no inconsistency in holding this central air conditioning system to be personal property and in giving Rowlen an allowance for its enhancement value to the real estate.

It is apparent to us from this record that hostility developed between the parties here when Rowlen remarried after his first wife, the mother of Mrs. Hermann, died. It is also true that the complaint for partition properly set forth the interests of the co-owners in the land, no one else being necessary party defendants, and the defendants did not raise a substantial defense in good faith. There was no substantial reason for the defendants to employ counsel to look after and protect their interests. Counsel for the plaintiffs was fair and impartial and there is nothing in this record to justify the conclusion that he would have represented only the interests of the plaintiffs. In such a case reasonable attorney's fees incurred by the plaintiff will be apportioned among all the parties and it matters not that the relations between the parties are not friendly nor that the partition proceedings are hotly contested. O'Malley v. Walker, 4 Ill. App. 2d 555, 124 N.E. 2d 690 (1955); Kunart v. Deal, 5 Ill. App. 2d 142, 124 N.E. 2d 591 (1955). We find no error in the court's order apportioning plaintiffs' attorney's fees among all the parties to this

litigation.

Taken with the case was a motion filed in this court by the defendants. Since we have held that the plaintiffs' attorney was entitled to have 2/3's of his fee paid by the defendants, the subject matter of this motion is now moot.

ORDERS AFFIRMED.

MC CORMICK, P.J., and BURKE, J., concur.

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PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT COURT COOK COUNTY
Plaintiff-Appellee,	)	
vs.	)	
JOHN W. PARKER,	)	HONORABLE ARCHIBALD CAREY JOHN C. FITZGERALD Presiding
Defendant-Appellant.	)	

MR. PRESIDING JUSTICE MC CORMICK DELIVERED THE OPINION OF THE COURT.

In a bench trial the defendant was found guilty of the crime of rape, and was sentenced to the Illinois State Penitentiary for a term of 15 to 30 years. On appeal he argues that he was not proved guilty beyond a reasonable doubt; that the court improperly questioned him; and that the sentence imposed is excessive.

To prove its case the State presented four witnesses. The complaining witness, Sharon Michelon [14 years old], testified as follows. At about 11:00 p.m., on November 16, 1966, she and her mother left a bus at 63rd and Wolcott Streets in Chicago, and were walking home when they noticed a car parked at the corner. Her mother thought the car looked suspicious and they started to run. When they were halfway down the block the defendant, John Parker, who had been in the car, started towards them. He was wearing boots, a green beret, and a paratrooper's uniform which had sergeant's stripes and a large "A" patch. He pointed a gun at them and said, "Don't scream, walk to the car and get in." They offered him money, but he pulled Sharon to the car, and pushed her mother down on the curb. As her mother was getting up she pushed the defendant off balance and ran down the street to her home. The defendant then drove into an alley where he kissed Sharon and ordered her to remove her underwear. He dragged her into a darkened garage and raped her, after which

he threw 40 cents at her and left. Sharon then ran to a gas station and had someone notify the police that she had been raped. When the police arrived they took her home, and then to the police station where she identified the defendant as the man who had raped her. She was taken to a hospital and an examination revealed the presence of human spermatozoa.

When Sharon identified the defendant at the police station he was wearing a dark green uniform, green beret and paratrooper boots. In his possession was a pen with the name "Sharon" on it, which Sharon identified as one she had in her purse the night of the crime.

Mrs. Michelon's testimony concerning the events corroborated that of her daughter. She stated that when she got home and told her husband of the incident he telephoned the police and described the defendant. Police Officer David Barrios verified that he had received the description from the parents and added that Mrs. Michelon had described the defendant as a male Negro, approximately 24 years of age, 6 feet tall, weighing about 170 pounds.

Officer Joseph Iverson testified that he arrested the defendant at about 3:15 on the morning of November 17, at which time he recovered the pen inscribed "Sharon" and a gun. The trousers and underwear the defendant was wearing at the time of arrest were put through chemical analysis and the results of the tests showed presence of human spermatozoa in the stains on the fly areas.

In his brief before this court the defendant says "the defense was consent"; he does not dispute the occurrence of the act of intercourse. At the trial the defendant testified that the girl accepted $15.00 for engaging in the act.

Ben McCaskill testified that he had known the defendant for several years, and that on the night in question he saw

him sitting in his car with the complaining witness; that he did not see any gun or anything else in the defendant's hands.

The defendant testified that the complaining witness approached him on the night in question, engaged him in general conversation, and asked if he wanted to take her on a date; that she got into his car and directed him to the garage where there was a mattress on the floor. He stated that he first paid her $15.00, then had intercourse with her; that as he was leaving he missed his wallet, and the girl said she didn't have it. He stated that when he saw the silhouette of a man in the door he took out his gun, and the girl said, "No, Joe, don't do it, he has got a gun." The defendant stated that he "told the silhouette to get out of the way" and walked out of the garage.

On cross-examination the defendant testified that on November 16,1966, he was an acting sergeant and carried a gun. At the end of the cross-examination both sides rested, and the court made a finding of guilty. The matter was continued for sentencing to October 6, 1967, at which time, after denying motions in arrest of judgment and for a new trial, the court sentenced the defendant to a minimum of 15 years and a maximum of 30 years in the penitentiary.

In his brief in this court the defendant asserts:

> "The complaining witness's case is ludicrous, unworthy of belief and so palatably [sic] incredible that it creates a reasonable doubt of the Defendant's guilt, and it is the insufficiency of the People evidence which creates such doubts."

Both the complaining witness and her mother testified to the same events prior to the abduction of the girl, and immediately after the mother reported details to her husband they were furnished to the police. The State's evidence appears to us to be clear and convincing.

The defendant also argues that he was denied a fair trial because the trial court questioned him extensively, thereby man-

ifesting a prejudicial attitude. The State argues in its brief that the issue has been waived, and cites two cases as authority for the assertion. One of those cases stands for the proposition that when one submits a written post-trial motion he waives his right to assert on review other issues which he failed to include in such motion. People v. Irwin, 32 Ill. 2d 441, 443. The other case stands for the proposition that alleged errors are waived if not properly objected to. People v. Seno, 23 Ill. 2d, 206, 209. These cases are inapposite since the defendant in the instant case did not submit a written motion; rather, he submitted a nonspecific oral motion.

A post-trial motion for a new trial is intended to bring to the court's attention alleged errors based upon evidence, instructions and rulings. In other words, by way of a post-trial motion for a new trial one raises matters which require the court to turn to the actual report of proceedings to determine whether an error was committed. On the other hand, a motion in arrest of judgment raises only the question of the sufficiency of the indictment, information or complaint, and the sufficiency of the court's jurisdiction.

The defendant's motion for a new trial was not submitted in writing, as it should have been, but was made orally because of "manifest errors that occurred through these proceedings . . ." Ill. Rev. Stat. 1967, ch. 38, §116. The State did not object to the fact that the motion was oral, however, and we believe the defendant was thus entitled to raise any issue he wished to on appeal. ~~Under current Supreme Court Rule 366(b)(3)(ii) "Neither the filing of nor the failure to file a post-trial motion limits the scope of review" in nor-~~

~~jury cases on review~~. In People v. Irwin, supra, the court pointed out in its opinion on a petition for rehearing that the defendant had made an oral motion in arrest of judgment in addition to his written motion for a new trial. The State's objection to the oral motion was overruled by the court. It would appear that if the Supreme Court placed primary emphasis on the requirement that the motions be in writing, it would have said that the trial court improperly overruled the State's objection. Instead, the court said that a nonspecific oral motion in arrest of judgment preserves for review every proper ground for arrest of judgment.

The same can be said of a nonspecific oral motion for new trial, as was made in this case; such a motion preserves for review every proper ground for a new trial, and unless the State objects and requires either a written motion or an oral motion specifying the alleged errors, all alleged errors may be raised on review. If one specifies the grounds upon which he seeks a new trial in his post-trial motion he is precluded from asserting other grounds on appeal. If he does not specify the grounds he may be creating for himself delay and expense to rectify an error which could have been rectified had he simply pointed it out to the trial judge. Nevertheless, the defendant here chose to remain nonspecific, and the State did not object to his nonspecific oral motion for new trial. The defendant may now properly urge that the trial court engaged in prejudicial examination.

In support of his contention that the judge committed reversible error when he engaged in extensive examination, the defendant cites the sole authority of People v. McGrath, 80 Ill. App. 2d 229, in which the magistrate himself brought out hearsay evidence from the complaining witness which "was of the most damaging nature to defendant" [page 233]. This

court held [page 234] that the magistrate relied "on the non-responsive answers and voluntary testimony of no relevance to the case on trial" and in reaching his judgment "relied at least in part on hearsay evidence." Furthermore, the magistrate went so far as to prove up venue for the prosecution, and "All of the testimony of the complaining witness in support of the allegations against defendant was brought out by the court's questioning" [page 235]. Under such circumstances it was concluded that the magistrate had become prosecutor and discarded his role of impartiality.

In the present case the trial court only asked the defendant a series of questions which took up eleven pages of transcript, while the full report of proceedings exceeds 250 pages. Furthermore, the State's Attorney asked questions of the defendant both before and after the court's questions. Just prior to the court's questions the State's Attorney had complained to the court that the defendant was using strong language against the State's Attorney. The court patiently and thoroughly explained the function of the State's Attorney and told the defendant that he "does not have a right to browbeat you and the Court will not permit that, and it is not proper to be argumentative with a witness, . . ." This is hardly a manifestation of a prejudicial judge. When the defendant said he was "on guard all the time" because he thought he was being ridiculed, the judge told him "I don't know if you are aware of everything, . . . but I myself wrote to the commanding general of Fort Campbell and asked that consideration be given you for your reinstatement in the service, . . ." This is the same judge the defendant now charges with manifesting a prejudicial attitude toward him.

In People v. Wesley, 18 Ill. 2d 138, the court said at page 154:

> "A trial judge has the right to question witnesses in order to elicit the truth or to bring enlightenment on material issues which seem obscure. People v. Marino, 414 Ill. 445.
>
> "The propriety of judicial examination is determined by the circumstances of each case and rests largely in the discretion of the trial court. . . . It should rarely be extensive and should always be conducted in a fair and impartial manner."

We think the trial court's actions in the instant case were proper. The examination was short, conducted fairly, and limited to permissible areas of inquiry with the intention of determining the truth.

Finally, the defendant urges that the sentence imposed upon him was excessive. The sentence was within statutory limits. The defendant stands convicted of having abducted a 14-year old girl at gunpoint in the presence of her mother and forcibly raping the girl in a deserted garage. While it is true that the defendant has no prior record of conviction it is also true that the crime was particularly brutal. In our opinion the sentence imposed was not excessive.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

LYONS, J., and BURKE, J., concur.

53387

MILTON M. HERMANN, MILDRED L. HERMANN and ALBERT MARSHALEK, Counterplaintiffs-Appellants, v. ROY G. ROWLEN, ADA L. ROWLEN and EDWARD MARSHALEK, Counterdefendants-Appellees.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Nathan M. Cohen, Presiding.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

This is a partition action. The plaintiffs, Roy G. Rowlen and Ada L. Rowlen, his wife, filed their verified complaint seeking partition of a parcel of improved real estate located in Berwyn, Cook County, Illinois, and naming as defendants, Milton M. Hermann and his wife, Mildred L. Hermann. The complaint alleged common ownership in the land in fee simple absolute by virtue of a tenancy in common between the parties with the plaintiffs owning an undivided 1/3 interest in joint tenancy and the Hermanns an undivided 2/3 interest in joint tenancy. The complaint also stated that the plaintiffs were in possession of the premises and had paid all real estate taxes; that no other defendant or person had any right, title or interest in and to the title to the real estate; and prayed for either a partition in kind or a judicial sale of the premises and a division of the proceeds according to the respective interests of the parties in the land. The complaint also prayed that attorney's fees incurred by the plaintiffs be apportioned among the parties.

The defendants, Milton M. Hermann and Mildred L. Hermann, his wife, filed a motion to dismiss the complaint alleging that the plaintiffs had failed to join, as defendants, persons having an interest in the premises as required by the Partition Act--Ill. Rev. Stat. (1967), ch. 106, §46--and supporting their motion

with a verified amended counterclaim for partition which purportedly joined all the necessary parties to the partition action. The counterclaim, naming the Hermanns and one Albert Marshalek as counterplaintiffs and the Rowlens and one Edward Marshalek as counterdefendants, was, in essence, an action for partition and an accounting having to do with the accrued rents purportedly owed by the Rowlens to the Hermanns and Marshaleks. Reasonable attorney's fees for counsel retained by the counterplaintiffs was also sought to be apportioned among all the parties.

The verified amended counterclaim alleged that the premises originally were held in joint tenancy by Roy G. Rowlen and his first wife, Amelia Rowlen, since deceased; that on January 5, 1966, sometime after Amelia's death, Roy G. Rowlen--the sole owner of the property in fee simple absolute as the surviving joint tenant--conveyed the property by a properly executed, delivered and recorded conveyance to himself, Mildred L. Hermann, and Albert F. Marshalek in joint tenancy; that on August 25, 1967, Roy G. Rowlen, then remarried, severed the joint tenancy by conveying his 1/3 interest in the premises to himself and to Ada L. Rowlen, his new wife, in joint tenancy; that by duly executed, delivered, and recorded mesne conveyances, Mildred L. Hermann and Albert F. Marshalek became the owners in fee simple of an undivided 2/3 interest in the real estate as joint tenants; that thereafter Mildred L. Hermann obtained fee simple title to the undivided 2/3 interest by virtue of the death of Albert F. Marshalek on December 18, 1967; and that on February 5, 1968, by mesne conveyances, Mildred L. Hermann and her husband, Milton M. Hermann, became the owners of this undivided 2/3 interest in fee simple as joint tenants.

Continuing, the counterclaim alleged that at the time of his death as well as at the time of Roy G. Rowlen's conveyance

to him on January 5, 1966, Albert F. Marshalek was divorced, had not remarried nor had any natural or adopted children, and left as his only heirs at law: Mildred L. Hermann, his sister; Albert Marshalek, his father; and Edward Marshalek, his brother; that Roy G. Rowlen occupied the premises both prior to and subsequent to January 5, 1966, the date of his conveyance to Mrs. Hermann and Albert F. Marshalek, and is presently occupying the premises with his wife, Ada L. Rowlen; that the counterplaintiffs and one of the counterdefendants, Edward Marshalek (apparently named as a counterdefendant because he would not join with the Hermanns and his father, Albert Marshalek, as counterplaintiffs--see the Partition Act, Ill. Rev. Stat. (1967), ch. 106, §46), were entitled, as cotenants and an heir of a deceased cotenant respectively, to a proportionate share (2/3's) of the rents accruing from January 5, 1966, to December 18, 1967, the period elapsing from the creation of the joint tenancy in Roy G. Rowlen, Mildred L. Hermann, and Albert F. Marshalek on January 5, 1966, to the latter's death on December 18, 1967, during which time Roy G. Rowlen occupied the premises; and that Mildred L. Hermann and Milton M. Hermann, her husband, were entitled, as cotenants, to a proportionate share (2/3's) of the rents accruing from December 18, 1967, the date of Albert F. Marshalek's death, until this cause has been finally determined.

The plaintiffs--counterdefendants, Roy G. Rowlen and Ada L. Rowlen, filed a motion to dismiss Albert Marshalek and Edward Marshalek from the partition proceedings alleging that the Marshaleks claimed an interest in the proceedings by virtue of being purported heirs at law of the deceased joint tenant, Albert F. Marshalek, but that a claim for accrued rents represents personal property which cause of action would vest in the estate of the deceased joint tenant and in his personal representative and would not descend to his heirs at law as an interest in or lien

upon the real estate. It was alleged, therefore, that Albert Marshalek and Edward Marshalek were neither necessary nor proper parties to the partition action.

The trial court denied the motion of the defendants, Mildred L. and Milton M. Hermann, to dismiss the partition complaint and sustained the motion of the plaintiffs-counterdefendants, Roy G. and Ada L. Rowlen, thereby dismissing Albert Marshalek, counterplaintiff, and Edward Marshalek, counterdefendant, from the cause, expressly finding that they had no interest in or to the real estate involved in this action and striking all reference to them in the amended counterclaim and in the verified answer filed by the Hermanns. Orders were entered to that effect from which this appeal is taken. In accordance with Supreme Court Rule 304, Ill. Rev. Stat. (1967), ch. 110A, §304, the trial court also made an express written finding that there was no just reason for delaying enforcement of or appeal from these orders.

The counterplaintiffs appeal relying upon the liberal joinder of parties provisions contained in the Civil Practice Act, Ill. Rev. Stat. (1967), ch. 110, §23 and §24, and contending that Albert Marshalek, by virtue of his claim to the accrued rents as an heir of the deceased joint tenant, Albert F. Marshalek, had an interest in the subject matter of the partition, and therefore the trial court erred in dismissing him from the instant action. Edward Marshalek, the counterdefendant who was also dismissed from the cause, has not joined in this appeal.

We recognize that section 71 of the Partition Act, Ill. Rev. Stat. (1967), ch. 106, §71, provides that the Civil Practice Act and the rules of the Supreme Court adopted pursuant thereto shall apply to all partition proceedings except as otherwise provided by the Partition Act. However, the procedural provisions of the Civil Practice Act, no matter how liberal, will not aid Albert Marshalek if the substantive law in regard to the remedy

of partition bars his claim to the accrued rents as an heir of the deceased cotenant. Slusarz v. Slusarz, 18 Ill. App. 2d 25, 31-32, 151 N.E. 2d 411, 414-15 (1958).

By virtue of the Partition Act, partition is an equitable remedy. One seeking this relief must file his verified complaint in chancery. Ill. Rev. Stat. (1967), ch. 106, §44. Once equity has acquired jurisdiction for one purpose, it will--under proper pleadings--proceed to effect complete justice between the parties. This long-established principle is referred to in section 48 of the Partition Act, Ill. Rev. Stat. (1967), ch. 106, §48, which provides that the court shall ascertain and declare the rights, titles and interest of all the parties to a partition suit, the plaintiffs as well as the defendants, and shall give judgment according to the rights of the parties.

If one cotenant occupies the premises to the exclusion of all the other cotenants, accrued rents would be in issue between the parties if the pleadings so specify either by the complaint seeking an accounting in addition to partition, or by a counterclaim seeking this relief as part of the answer. A court of equity entertaining a partition action would have the power to adjudicate the issue of accrued rents both by virtue of its inherent power and by virtue of §48 of the Partition Act. Thomas v. Hamill, 106 Ill. App. 524 (1902).

In a typical case, the cotenant seeking this relief would be both a necessary party to the partition action--since he would have an interest in the land by virtue of his ownership therein and must be joined as a party defendant if he had not brought the suit (Ill. Rev. Stat. (1967), ch. 106, §46)--and a proper party since he may litigate the issue of accrued rents and seek this relief incidental to a partition, thereby enabling a court of equity to effect complete justice among the co-owners.

The cases cited by the counterplaintiffs, Rhodes v. Rhodes,

78 Ill. App. 117 (1898) and Pollack v. Kuhn, 96 Ill. App. 2d 82, 237 N.E. 2d 745 (1968), recognize this principle and apply the rule of law in a situation where one cotenant, who is living, seeks to recover accrued rents in a partition suit from another cotenant who is occupying the premises. See also Sharp v. Sharp, 328 Ill. 564, 160 N.E. 140 (1928); Coleman v. Connolly, 242 Ill. 574, 90 N.E. 278 (1909); and White v. White, 28 Ill. App. 2d 19, 169 N.E. 2d 839 (1960).

The instant case, however, involves the question of whether or not Albert Marshalek is a proper party to this partition action. He seeks to recover accrued rents from Roy G. Rowlen as the heir of a deceased cotenant, Albert F. Marshalek. It has been held in this jurisdiction that rents which have accrued up to the date of the cotenant's death are personal property and belong to the estate of the deceased joint tenant. Only his administrator or executor is the proper party to seek enforcement and collection of this claim. Claussen v. Claussen, 279 Ill. 99, 105, 116 N.E. 693, 696 (1917); Poiset v. Townsend, 166 Ill. App. 384, 387 (1911).

Therefore, only the administrator or executor of Albert F. Marshalek's estate was the proper party to bring an action for accounting against Roy G. Rowlen and Ada L. Rowlen, his wife, for the rents which had accrued between January 5, 1966 and December 18, 1967, the date of Albert F. Marshalek's death. The heirs of Albert F. Marshalek, including the counterplaintiff, Albert Marshalek, were not the proper parties to seek this relief.

The orders are affirmed.

ORDERS AFFIRMED.

MC CORMICK, P.J., and BURKE, J., concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 1st day of December, in the year of our Lord one thousand nine hundred and sixty-nine, within and for the Second District of Illinois:

Present -- Honorable CHARLES H. DAVIS, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable THOMAS J. MORAN, Justice
HOWARD K. KELLETT, Clerk
HARRY E. BOOTH, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On September 11, 1970 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

No. 69-136 Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROGER L. KNELL, Defendant-Appellant.	)	Appeal from the Circuit Court of Winnebago County, Illinois.

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

Roger L. Knell was indicted as a co-defendant with McCoy Ford in a two-count indictment in the Circuit Court of Winnebago County charging robbery and armed robbery. Upon his motion the court granted a severance of Knell's trial from that of McCoy Ford. Thereafter, Ford pleaded guilty to the charge of armed robbery. A jury found Knell guilty of the charge of armed robbery and he was sentenced to a term of not less than three nor more than eight years in the state penitentiary. Defendant appeals from the judgment and sentence contending that he was not proved guilty beyond a reasonable doubt in that (1) the State failed to identify him as being present at the scene of the crime or as participating in the commission of the crime, and (2) the State failed to prove him legally accountable for the conduct of McCoy Ford under the requirements established by Section 5-2 of the Criminal Code.

About 9:00 A.M. on July 29, 1968, McCoy Ford held up and robbed at gunpoint the Clark Oil Station at Windsor and Alpine Roads in

Winnebago County. He was alone but two witnesses were present at the station when the robbery occurred, Lary Rand, the territorial manager for Clark Oil and Refining Corporation, and Robert Jepson, the station manager. At the trial Rand, testifying for the State, stated that after the robbery he followed Ford out of the station on foot. He saw Ford get into the passenger side of a 1962 or 1963 maroon or dark red Pontiac which was parked on Windsor Road, headed west. He got into his own car and followed the Pontiac but lost sight of it as it traveled through various streets in the area. He did not see the driver of the car, nor did he see a rear license plate.

About 3:00 A.M. the morning after the robbery Rand was taken by police officers to a funeral home parking lot and was shown a 1962 or 1963 maroon Pontiac, which was owned by Roger Knell, but Rand was unable to positively identify it as the automobile he had followed the previous day. He testified that the first time he saw Roger Knell was at the parking lot when he viewed the car.

Jepson, testifying on behalf of the defendant, identified Ford as the person who robbed the station and also stated that he was acquainted with Knell, but did not see him or his car on the day of the robbery.

An employee, Adams, testified that he and another employee, Haffey, left the station that morning to get coffee and were gone when it was held up. About three or four blocks from the station they met and conversed with Roger Knell. He was driving his dark red Pontiac and had a passenger whom they could not see.

Defendant's brother, Ivan Knell, testified that he was with Roger in his car when Roger turned down his window and talked with Adams. He testified that he and Roger then proceeded to the Chrysler plant and

arrived there about 10:00 A. M.

The defendant testified that he owned a 1962 maroon Grand Prix Pontiac on July 29, 1968. On that morning he went to his brother's home about 8:00 to 8:30 A. M. He and his brother went to the Chrysler plant, where he was employed, to get his medical disability check. On the way to the plant he saw Adams and stopped to talk with him. He testified that he arrived at the Chrysler plant about 9:45 A. M., spent about 45 minutes there, and then drove back to his brother's home. Both defendant and his brother testified that they were in the vicinity of the Clark station to see Roger's new residence.

The State introduced evidence of a conversation between defendant and McCoy Ford which occurred on the evening of July 27, 1968. A nephew of Ford's, Gerald Berkhamer, testified that he and his younger brother and Ford met Roger Knell that evening as they were walking and Knell offered them a ride home. While in the car Roger Knell asked Ford if he could "get hold of a gun for a job." Ford said he might if he was let in on it. Roger said he couldn't because he already had a connection and Ford thereupon told him not talk in front of the boys. Roger Knell testified that some conversation had taken place at that time, but denied that the word "gun" was ever used. He testified that the expression "planning a job" was used in the conversation in the context that he needed a job because he was not working.

There was testimony at the trial by police officers to the effect that when they found the suspect's 1962 maroon Pontiac in the parking lot, it appeared that the rear license plate had been tampered with and that there was a horizontal crease line across the top portion of the plate. Another police officer testified that when he went to the home of Roger Knell's brother with a warrant for Knell's arrest on August 9, he had to make two trips, on the second trip finding the defendant hiding in a

cupboard under the kitchen sink.

There was also testimony from an automobile salesman that Roger Knell traded his 1962 Pontiac for another car on July 30, 1968, the day after the robbery.

McCoy Ford was not called as a witness in defendant's trial.

In support of his contention that he was not proved guilty beyond a reasonable doubt because the State failed to identify him as being present at the scene of the crime or participating in it and failed to prove him legally accountable for the conduct of McCoy Ford, defendant states that this is not a case where identification of the defendant is doubtful as there was no identification of the defendant at all. He admits that the evidence places him in the vicinity of the Clark oil station on the morning of the robbery, but claims that this in no way implicates him in the crime. He also contends that he has proved an alibi for a period of time before, during, and after the robbery, and that the alibi is uncontradicted by any identification evidence or other evidence.

It is true that there is no eye-witness testimony that defendant was present at the scene of the robbery, but we disagree with defendant's contention that there is no evidence that he participated in the crime. There is no dispute concerning the fact that McCoy Ford committed the robbery, but defendant must and does admit that there was a conversation between defendant and Ford during the evening two days before the robbery. That conversation, as stated by a nephew of Ford, Gerald Berkhamer, has been detailed previously, as well as defendant's testimony relative thereto. But defendant claims that this conversation is devoid of any criminal content because no mention was made of the Clark oil station in that conversation.

He further asserts that he then needed a job; that the conversation related to that fact, and that the conversation was two days before the actual robbery.

This case is obviously not a case of a doubtful and uncertain identification as opposed to an uncontradicted and credible alibi and, therefore, the defendant's cited cases of The People v. Gardner, 35 Ill. 2d 564, and The People v. McGee, 21 Ill. 2d 440, are not applicable. The evidence presented by the State is entirely circumstantial as there is no eye-witness identification. However, such evidence is competent and alone sufficient to sustain a finding of guilty. People v. Marino, 95 Ill. App. 2d 391, 394.

We believe the circumstances linking the defendant with the crime are sufficient to show his guilt beyond a reasonable doubt. The jury could very well believe Gerald Berkhamer's testimony relative to the conversation between Ford and the defendant two days before the robbery wherein the defendant asked Ford if he could "get hold of a gun for a job," rather than the defendant's explanation of the conversation. It was for the jury to determine the credibility of the witnesses. It is undisputed that five to ten minutes before the robbery defendant was seen three or four blocks west of the Clark station in a 1962 or 1963 maroon Pontiac, and that immediately after the robbery Ford entered the passenger side of a car of the same description which was waiting for him parked in the roadway facing west on Windsor Road one block west of the station. There is also testimony that the automobile in question had not, during the robbery, passed through the intersection on Windsor Road where the station is located, and that there are no cross streets between the station and the waiting automobile. Also, Larry Rand noted that the get-away car had no visible rear license plate and the following morning when Rand looked at defendant's car in the presence of an officer, the officer noticed signs

of tampering with the rear license plate indicating that the plate might have been removed and replaced recently and that there was a horizontal crease in the upper portion of the plate indicating that the plate might have been bent up to hide the number. There is also the testimony of the arrestingofficers that the defendant, when arrested, was found in a house hiding in a cupboard under the sink. Undisputed are the facts that the defendant and Ford were friends, and that defendant was near the scene of the crime shortly before its commission, driving a car matching the description of the get-away car.

As to defendant's alibi, his sole witness was his brother, Ivan Knell. Defendant testified that he went to see an insurance man, a Mr. Stapleton, at the Chrysler plant at the time the robbery was in progress, but he did not call Mr. Stapleton to testify. He also mentioned that he rented an apartment in Loves Park that he showed his brother, but the owner or agent of the apartment was not called to verify this statement. The jury was entitled to consider the fact that persons who could verify the alibi were not called to testify. The People v. Williams, 40 Ill. 2d 522, 529. The jury in determining defendant's guilt had the obligation to pass upon the credibility of the alibi and could properly discredit the testimony of the defendant and the corroborating testimony of his brother as to the alibi, and therefore determine that the alibi defense did not provide a reasonable explanation consistent with innocence.

The State has cited The People v. Gardino, 13 Ill. 2d 58, to show the circumstances that must be present to warrant reversal of a conviction where there is an alibi. In Gardino there was an uncontradicted alibi, but that alibi was corroborated by all persons in a position to verify the facts of the alibi; and upon the factual situation therein present, the court concluded that there was no evidentiary link between defendant's car

and the get-away car. There is an evidentiary link in our case because of defendant's known association with Ford, the conversation about getting "a gun to pull a job," his presence in the vicinity of the crime, the similarity of the get-away car to defendant's car, and the evidence pertaining to the tampering of the license plate. Also to be considered are the facts that he sold the automobile the day after the robbery and the circumstances of his arrest. We cannot say that defendant's alibi was of the same quality and credibility as the Gardino alibi.

A conviction can be sustained upon circumstantial evidence, and proving a defendant guilty beyond a reasonable doubt does not mean that the jury must disregard the inferences that naturally flow from the evidence before it. Furthermore, a reviewing court will not reverse a judgment of conviction unless the evidence is "so palpably contrary to the verdict, or so unreasonable, improbable or unsatisfactory as to justify entertaining a reasonable doubt of defendant's guilt." The People v. Williams, supra, p. 526.

Defendant's other contention is that the evidence was not sufficient to prove him legally accountable for the conduct of Ford under the requirements established by Section 5-2 of the Criminal Code of 1963. Illinois Revised Statutes, ch. 38, sec. 5-2 (c) provides in part that a persons is legally accountable for the conduct of another when:

> "Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense."

The testimony previously detailed in this opinion is sufficient to dispose of this argument.

The reasonable inferences shown from the circumstances

are that the defendant participated in the planning, preparation, and execution of the crime by providing and driving the get-away car. We believe that the jury could properly determine that defendant's criminal intent and participation was shown beyond a reasonable doubt. Although the defendant cites the case of People v. Ramirez, 93 Ill. App. 2d 404, 411, on the law of accountability, the facts of that case are entirely different, since there was no proof in the Ramirez case of any affirmative conduct by the defendant of aiding or abetting the commission of a crime.

For the reasons stated above, the judgment of the Circuit Court of Winnebago County is affirmed.

JUDGMENT AFFIRMED.

DAVIS, P. J. and MORAN, J., concur.

litigation.

Taken with the case was a motion filed in this court by the defendants. Since we have held that the plaintiffs' attorney was entitled to have 2/3's of his fee paid by the defendants, the subject matter of this motion is now moot.

ORDERS AFFIRMED.

MC CORMICK, P.J., and BURKE, J., concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court)
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 1st day of December, in the year of our Lord one thousand nine hundred and sixty-nine, within and for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Acting Presiding Justice
Honorable GLENN K. SEIDENFELD, Justice
Honorable MEL ABRAHAMSON, Justice
HOWARD K. KELLETT, Clerk
HARRY E. BOOTH, Sheriff

BE IT REMEMBERED, That afterwards, to-wit: On September 17, 1970 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

No. 70-19

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, vs. DONALD GODBOLD, Defendant-Appellee.	)	Appeal from the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois.

JUSTICE THOMAS J. MORAN DELIVERED THE OPINION OF THE COURT:

The State appeals from an order dismissing its complaint. The defendant failed to file briefs or otherwise appear in this Court.

On November 10, 1968 the defendant received a uniform traffic ticket from the Downers Grove police. The charge was a violation of Section 46 of the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat. 1967, Chap. 95½, Sec. 146) which concerns speed limitations.

The record shows that the reverse side of the ticket has written upon it - "Not Guilty"-, signed by the magistrate and dated December 23, 1968. The clerk's file discloses that on this date a plea of not guilty was entered and a finding of not guilty was had.

On March 11, 1969 a "long form" complaint and notice was filed by the State. This complaint charged the defendant with the same offense arising out of the same facts.

At this point the record becomes somewhat hazy. The best we can glean from it is that on March 24th the defendant filed a motion to

dismiss the complaint and we presume that it was denied. At any rate, a second motion was filed by the defendant requesting the court to reconsider its former motion. The second motion claimed that the defendant had been acquitted on December 23, 1968, as shown by the court record, and therefore, double jeopardy attached.

On August 25, 1969 the State, defendant and defendant's counsel were present in court. The motion was argued but no evidence was introduced. The court allowed the motion. Thereafter the State filed a motion to vacate the order of dismissal (See, People v. Gallas, 77 Ill. App. 2d 132 (1966)). This motion asserted that the defendant did not produce any evidence to sustain his burden of proof on the issue of double jeopardy, and further, that the State was not given an opportunity to present witnesses rebutting the defendant's contention. Attached to the motion was the affidavits of three Downer Grove police officers. The affidavits were alike and related that they had arrested the defendant on November 10, 1968 for speeding; that on December 23, 1968 they were present at the Downers Grove field court all day; that the case of the defendant was never called to trial and, that they were never called as a witness. The court denied the motion and this appeal followed.

The State claims that (1) there is insufficient evidence in the record to justify a dismissal of the complaint based upon double jeopardy, and (2) the trial court erred by failing to require the defendant to produce evidence in support of his motion to dismiss.

This Court fails to find any merit in the State's contentions. Indirectly the State is attempting to upset the judgment of the trial court entered some 78 days previously, without appealing the same. This is not possible even if the double jeopardy issue had not been raised in the trial court. People v. Gallas, supra.

It seems to have been the State's theory that by the filing of the second complaint it would be able to attack the validity of the

judgment in the former case. This, also, is not possible. The record in the first case imports verity and is conclusive. It cannot be impeached, contradicted or amended except by reason of other matters in the same record. The People v. Clark, 30 Ill. 2d 67, 73 (1963); The People v. Gayles, 24 Ill. 2d 242, 244 (1962).

To commence a second suit to impeach a previous judgment from which no appeal was taken and thereby create a new record in which alleged error is claimed on appeal is wrong. The record in the first case found the defendant not guilty. This was not only conclusive but created sufficient evidence upon which the trial court's order could be founded.

JUDGMENT AFFIRMED.

ABRAHAMSON and SEIDENFELD, J.J. concur.

No. 52286

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WILLIAM STEVENS, Plaintiff-Appellant, vs. EUGENE RYDER, LENA RYDER and ROBERT PUSAVC, Defendants, and CHECKER TAXI CO., INC., a Corp. and BENNETT WALDREN, Defendants-Appellees.	Appeal from the Circuit Court of Cook County. Honorable David A. Canel, Trial Judge.

EBERSPACHER, J.

The plaintiff brought this action for negligence against defendants as a result of an automobile collision that occurred on October 30, 1961. Upon trial, the 9th day of December, 1966, the plaintiff prevailed in his action against but one of the named defendants and was awarded damages in the amount of $147,250.00. The trial court directed a verdict in favor of the appellees in this cause and entered judgment for appellees, from which judgment plaintiff has appealed.

On the night of October 30, 1961, an inclement night, shortly after midnight the plaintiff William Stevens was on his way to work as a police detective in plain clothes, when his automobile was struck from the rear by an auto driven by Robert Pusavc. This collision, apparently minor in consequence, resulted in no injury to the plaintiff. It occurred while plaintiff was proceeding easterly on the Congress Expressway nearing the Pulaski Road overpass. There were four east bound traffic lanes at the place of collision. Subsequent to the collision the Pusavc automobile stopped on the northside of the eastbound lanes and the plaintiff's automobile on the southside, off the

traveled portion of the expressway, a short distance west of Independence Blvd. exit. After Pusavc walked over to the plaintiff's automobile a brief conversation ensued. The plaintiff then started walking in an easterly direction up the Independence Blvd. exit ramp attempting without success to flag down an automobile. While on his way to obtain assistance, he saw that the defendant Walldren, driving for defendant Checker Taxi Co., had stopped his cab slightly east of the plaintiff's auto, and he returned to the stopped taxi which was stopped on the south side of the road with some portion of the left rear remaining on the highway. The cab had its lights on, its dome light on and its left turn signal flashing. The defendant Walldren leaned his head out of the open window on the passenger side and asked if there was anything wrong. Plaintiff reached and opened the door on the passenger (right) side of the cab, leaned into the cab and informed the driver that he was a police officer and asked the cab driver to call for assistance. Plaintiff was standing with his head and shoulders inside the passenger side door area. The cab driver used his radio phone and told his dispatcher of the accident. Plaintiff then asked the cab driver if he would inform the plaintiff's office that he would be late. The cab driver then reached for a pad of paper on the dashboard. At this point the cab was struck in the rear by defendant Ryder's automobile which had been traveling east on the expressway. There was no warning prior to the collision. The taxi was knocked completely across the expressway and the plaintiff was knocked and rolled sixty-five feet eastward on the expressway and suffered severe and permanent injury.

The only variance in the testimony was to the extent that the taxi extended into the traffic lanes of the expressway, the plaintiff stating that approximately one-half of the cab extended into the traffic lane and the cab driver claiming that the cab did not extend more than a foot and a half into the lane.

At the time of the collision the weather was inclement and the pavement was wet and the visibility poor.

At the close of the evidence, the trial court directed a verdict in favor of the defendant cab driver Walldren and the defendant Checker Taxi Co. The court further

directed a verdict as to liability in favor of the plaintiff against the defendant Ryder. The case was submitted to the jury as to the damages only against the defendant Ryder, the jury returning a verdict assessing the amount of $147,250.00. The plaintiff has brought this appeal from the directed verdicts in favor of defendants Walldren and Checker Taxi Co.

Upon the judgments being entered, on December 9, 1966, plaintiff with the approval of his counsel executed and delivered to counsel for defendant Ry the following instrument:

CCL 11 RELEASE (SATISFACTION) OF JUDGMENT

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

WILLIAM STEVENS)
v.) No. 61S 24942
EUGENE RYDER)

RELEASE (SATISFACTION) OF JUDGMENT

..WILLIAM STEVENS., the ....judgment creditor.....
(judgment creditor) (assignee of record)

....., having received full satisfaction and payment,
(Legal representative)

released the judgment entered on...Dec.. 9,... 1966, against defendant EUGENE RYDER.....
for $147,250.00 and costs.

....December 9....., 1966....

.....

/S/ William C. Stevens.....

Approved:

GILMARTIN & WISNER

By./S/.Richard.S.. Wisner.....
Attorney of Record

Name: Stuart H. Verson
Attorney for: Eugene Ryder
Address: 10 So. Sa Salle St.
City
Telephone: AU-3-5581

JOSEPH J. McDONOUGH,
CLERK OF THE CIRCUIT COURT OF COOK COUNTY

On January 6, 1967, plaintiff filed his post trial motion urging that the order directing verdicts and judgments thereon be vacated and for new trial. On January 11, counsel for defendants Walldren and Checker served notice on counsel for plaintiff of presentation of a verified motion, with copy of motion attached, to strike plaintiff's post trial motion as being moot, advising that the motion would be presented on January 13.

In it these defendants alleged execution and delivery to judgment debtor Ryder of a full release and satisfaction of the judgment against Ryder; that the release and satisfaction operated as a release and satisfaction of plaintiff's claim against these defendants. Defendants prayed that the court "require the plaintiff by order to answer under oath the allegations contained here concerning the execution by the plaintiff and delivery to Eugene Ryder of the satisfaction and release of judgment"; that defendant Ryder be required to answer under oath and file with his answer a reproduced copy of the release and satisfaction if in his possession and control", and "that upon finding by the court that the judgment against Eugene Ryder has been either released, or satisfied or both, then that an order be entered striking the plaintiff's aforementioned post trial motion".

On January 13, the attorneys for Plaintiff and Ryder were again noticed that the Motion to strike the Post Trial Motion would be presented on January 30 and requested Ryder's attorneys pursuant to Supreme Court Rule 237 to produce the executed releases and satisfaction referred to in the motion. Neither counsel for Plaintiff or Ryder responded to either notice, and the Motion to strike the Post Trial Motion was twice called up, but not considered due to the absence of plaintiff's and defendant Ryder's counsel. On February 6, movants caused a subpoena to be served on defendant Ryder's counsel to produce the executed release and satisfaction on February 7, the date on which plaintiff's Post Trial Motion was set for hearing.

On February 7, the Post Trial Motion and Motion to strike the Post Trial Motion were called for hearing; counsel, for plaintiff, defendants Walldren and Checker, and defendant Ryder were all present, and a copy of the release (satisfaction) of judgment

was presented to the court. The following colloquy occurred:

"The Court: What do you say about his motion to strike:

Mr. Jesmer: (Counsel for Checker and Walldren) Well, inasmuch as the motion is valid --

The Court: Let's first ask him, what do you have to say about this motion?

Mr. Wisner: (Counsel for Plaintiff) I don't believe he has any right at this time to file a motion such as this.

I don't believe this Court has jurisdiction on that type of motion to strike a post trial motion.

Your Honor has heard the case --

The Court: But if there's been a satisfaction of the judgment in the case, there is no post trial motion because the case is moot.

Mr. Wisner: A satisfaction of judgment was executed. There is no question about that.

Mr. Jesmer: Is this it?

Mr. Wisner: There was a satisfaction of judgment.

Mr. Jesmer: Has it been executed by the plaintiff?

Mr. Wisner: It was executed by the plaintiff and by us.

Mr. Jesmer: I submit this in evidence, Your Honor.

Mr. Wisner. The satisfaction was not delivered. The satisfaction is being held by an escrowee.

There was no deliverance of the satisfaction. The satisfaction has not been filed and, therefore, there is no satisfaction in this case.

The Court: I'd suggest you withdraw your post trial motion. If you don't withdraw it, I'm going to make a ruling. If you withdraw it, I will give you back this motion to strike because I think you're going into something that will jeopardize something else but you're going to be the doctor, not me.

Mr. Wisner: May I ask the Court the reason --

The Court: There is a reporter here. If you want me to say it I will.

Mr. Wisner: Can we get this off the record then?

The Court: Yes.

(Discussion had off the record.)

The Court: The motion to strike the post trial motion will be allowed.

Mr. Jesmer: First, may I have leave to file this?

The Court: He has admitted in open court he issued the satisfaction. This is the satisfaction which will be received in evidence as Petitioner's Exhibit 1.

The post trial motion will be stricken on the defendant's motion to strike since the question is moot."

The Court then entered the following order:

"This matter coming on to be heard upon the plaintiff's post trial motion, it is, on motion of defendants Checker Taxi Co. and Bennet Waldren, ordered that leave be and is hereby given them to file instanter their motion to strike the post trial motion as being moot.

"Attorney Richard Wisner, having acknowledged in open court that the release and satisfaction of judgment which have been produced pursuant to subpoena by the attorney for the judgment debtor Eugene Ryder that the release and satisfaction of judgment was executed by the plaintiff William Stevens and Richard Wisner as his attorney, said release and satisfaction of judgment is accepted in evidence, leave is given to substitute in lieu of the original a reproduced copy thereof.

"The court finds that the judgment against Eugene Ryder has been fully satisfied and released by the plaintiff and that therefore the post trial motion is moot. It is therefore ordered that the plaintiff's post trial motion is stricken."

The plaintiff then gave notice of the presentment on March 7, 1967 of a motion to vacate the order of February 7 and for ruling on plaintiff's post trial motion. In it plaintiff alleged that the order signed by the Court was not approved by plaintiff's counsel and that the order incorrectly stated that plaintiff's attorney "having acknowledged in open court that the release and satisfaction of judgment . . . . was executed by the plaintiff William Stevens"; that such finding or acknowledgment was incorrect in that plaintiff's attorney at no time acknowledged the execution of any "Release", and that plaintiff's attorney simply knows that a court form entitled "Satisfaction of Judgment" was signed by him and his client; that such document was delivered to defendant Ryder's counsel "as escrowee, under an oral agreement between said parties" as more fully appears in affidavits attached; that "to avoid any misconception or ambiguity regarding the aforesaid document" plaintiff by his

attorney executed a covenant not to enforce judgment dated March 1, 1967 in which plaintiff reserved the right to proceed against Waldren and Checker for damages arising out of the accident, and that upon the delivery of the covenant the satisfaction of judgment was destroyed. Executed copy of the covenant was attached as were the affidavits of plaintiff's counsel and counsel for defendant. The affidavit of plaintiff's counsel acknowledged the execution of the "Release (satisfaction) of Judgment" and avers that at the time of delivery to defendant Ryder's counsel it was orally agreed that Ryder's counsel was to hold the instrument as escrowee and that plaintiff would take no action to enforce or satisfy plaintiff's judgment and that it was agreed that only in the event of enforcement or satisfaction of the judgment would Ryder's counsel deliver the document to Ryder and record the document with the Clerk; further that it was affiant's intention on execution and delivery the instrument was intended by him only as a covenant not to enforce judgment. In his affidavit Ryder's counsel avers that he accepted the original instrument as escrowee to hold it and not record it so long as plaintiff took no action to enforce the judgment against Ryder, and that because of the ambiguity or misconception "thereafter made regarding the original document, he accepted the Covenant not to Enforce Judgment" and destroyed the original document entitled "Release (Satisfaction) of Judgment".

Upon hearing the court noted that the covenant to not enforce judgment was made and the original Release (Satisfaction) of Judgment was destroyed after he had on February 7 ruled on it and concluded that "these affidavits really show that there was some scheme or something or other here that shouldn't be allowed" and denied the motion. Upon counsel urging for a ruling on the merits on the post trial motion the court denied the post trial motion as a conditional ruling pursuant to Sec. 68.1(6) of the Practice Act, (Ch. 110, Sec. §8.1(6), Ill. Rev'd. Stat. 1965).

In this Court appellees have moved to Dismiss this Appeal as being moot and plaintiff appellant has filed herein suggestions to deny the Motion to Dismiss the Appeal, which have been taken with the case. Appellees contend that the judgment debt against Ryder having been satisfied operates as a release and satisfaction of

plaintiff's claim against Checker and Walldren; that plaintiff failed to reply to the Motion to strike Plaintiff's Post Trial Motion supported by memorandum under oath and that pleadings not denied stand admitted citing Ch. 110, Sec. 40(2), Ill. Rev'd. Stat. 1965 and Scott v. Kerner, 32 Ill. 2d 561 at 564. Appellees therein contend that a release of one joint debtor release all his joint debtors and that there can be but one satisfaction of a claim or debt citing Clark v. Mallory, 185 Ill. 227. They therefore contend that the appeal presents a moot question and no longer presents an actual controversy over interests or rights of parties as respects a motion to dismiss an appeal citing Harvey, et al. v. Cahill, et al., 57 Ill. App. 2d 1.

Plaintiff-Appellant's suggestions in denial of the Motion to Dismiss the Appeal allege that the executed "Release (Satisfaction) of Judgment" delivered to defendant Ryder's counsel was delivered under an oral agreement that Ryder's counsel was to hold it as escrowee and would not record it and that it was intended as a covenant not to enforce the judgment against Ryder. Plaintiff then contends that the intention of the parties was that the original document was that it was a covenant not to enforce the judgment against Ryder and that the intention of the parties controls what the document constitutes and that under the circumstances the intention of the parties will control and the document will be held to be only an agreement not to enforce judgment against the party to whom the document is given, citing Forester v. Sheridan Trust & Savings Bank, 257 Ill. App, 463, 473, Essington v. Parish, 164 Fed. 2d 725, 729 and Wallace v. Armstrong, 236 Ill. App. 457, 460. Appellant therefore urges that it is proper to consider parol evidence to determine the intention of the parties to the document, in this case the affidavits of plaintiff's and defendant Ryder's counsel and that since defendants Checker and Walldren were not parties to the document the parol evidence rule is not applicable, citing Hulke v. Inter-National Manufacturing Co., 14 Ill. App. 2d 530, Essington v. Parish, supra and Reams v. Janoski, 268 Ill. App. 8.

Plaintiff-Appellant's suggestions in opposition to the Motion to Dismiss the Appeal are based on an assumption of a question of fact that has been, in the trial

court, determined adversely to his position. A reading of the record leaves no question but that the trial court read and considered the affidavits presented with plaintiff's motion to vacate the order of February 7. We agree that the parol evidence rule is not applicable and that it is proper to consider evidence of the intention of the parties to a document where the controversy concerning the document is not between the parties to the document.

When the legal effect of the execution and delivery of the "Release (Satisfaction) of Judgment" was first brought to plaintiff's and defendant Ryder's attention by the motion to strike the post trial motion, neither of them saw fit to respond. Upon hearing on that motion neither saw fit to present any evidence, and although both were present neither suggested a desire to present evidence. Plaintiff's counsel after clearly admitting and acknowledging the execution and delivery, and the document being offered in evidence, urged first that the document was not delivered, then advised, "The satisfaction is being held by an escrowee" and that the satisfaction had not been filed. Neither, at that hearing, made any contention that the instrument was intended to be a covenant not to enforce the judgment. Neither at that hearing, nor at the hearing on plaintiff's motion to vacate the order a month later, offered any evidence concerning the consideration given for the instrument. The trial court noted that the substituted covenant not to enforce judgment was executed only after the original instrument was declared to be what it said it was, and an order supported by the only evidence offered was entered; and that the document dated March 1 was a self serving document.

Under such circumstances we can understand the attitude of the trial court, and cannot say that his finding of fact and construction of the instrument was against the manifest weight of the evidence. Neither can we say that there was an abuse of discretion. From this record we cannot determine the factual question involved in construction of the "Release (Satisfaction) of Judgment", adversely to the determination of that question below, and therefore grant the Motion to Dismiss the Appeal.

Appeal dismissed.

CONCUR: /S/ Joseph H. Goldenhersh

CONCUR: /S/ George J. Moran

(24540—4M—9-70) 160-o

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE WILLIAM G. EOVALDI, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 24th day of SEPTEMBER A. D. 19 70, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

General No. 11173 Agenda No. 70-37

STATE OF ILLINOIS

IN THE APPELLATE COURT

FOURTH DISTRICT

Victor Hull, Administrator De Bonis Non of the Estate of Daisy F. Lease, deceased,

Plaintiff-Appellant

vs.

Illinois State Bank of Quincy, as Executor of the Purported Last Will and Testament of Alice C. Lease, deceased, and Successor Trustee of the Trust created by the purported Last Will and Testament of Alice C. Lease, deceased; Department of Conservation of the State ofIllinois; St. Joseph's Hospital for the Chronically Ill; Holy Redeemer Church, located in Barry, Illinois; Alva A. Lewton; Ferne S. Hull; Robert E. Lease; Lois Lewton and Daisy F. Lease, an incompetent.

Defendants-Appellees

APPEAL FROM CIRCUIT COURT ADAMS COUNTY

Smith, J.

The trial court denied the plaintiff's suit for specific performance of a written contract for deed executed August 9, 1929, whereby Alice Lease contracted to convey an undivided one-fourth interest in a 180-acre farm to her sister, Daisy F. Lease. We affirm.

The resolution of this case is controlled by the principles stated in Beesley Realty & Mortgage Company v. Busalachi, 28 Ill.2d 162, 190 N.E.2d 715, 716. At p. 165 of the Illinois Reports, the court stated:

"Before a party can compel specific performance of a contract he must show that he has performed it in all its parts or that there is a reasonable and just excuse for nonperformance. (Dembski v. Lynwood Development Corp., 23 Ill.2d 395; Lovins v. Kelley, 19 Ill.2d 25, 28-29; Brink v. Steadman, 70 Ill. 241.) The remedy of specific performance is not a matter of right, and one who seeks to specifically enforce a contract for the sale of real estate must prove that he has complied with its terms, or was able, ready and willing to comply, but was prevented from doing so by the other party to the contract. (Kingsley v. Roeder, 2 Ill. 2d 131.) This the plaintiff has not done."

The farm in question was deeded by the Master in Chancery to Alice C. Lease on August 5, 1929, for $6,175.00. On August 9, 1929, she entered into a contract with her sister, Daisy F. Lease; her brother, Robert E. Lease; and a sister, Lois E. Lewton, and contracted to convey to each of them an undivided one-fourth interest in the farm. The contract provided that the brother and sisters would each pay to Alice $793.75, together with 6 percent interest, from the date of the agreement and upon such payment Alice could draw down personal property of her own pledged to the bank to secure a loan of $3,175.00. The contract further recites that each of the sisters and brother agreed to assume an undivided one-fourth of the $3,000.00 real estate mortgage representing a part of the purchase price on the farm. Upon the payment of the $793.75, Alice agreed to execute and deliver a deed to each of the parties for an undivided one-fourth interest in the real estate subject to an undivided one-fourth of the $3,000.00 mortgage executed by her to the Broadway Bank of Quincy. The interest and obligations of Lois and Robert are not involved in this case since their interests were transferred to Alice many years ago.

Alice died on January 10, 1965, without ever having deeded this one-fourth interest to Daisy. Her will was admitted to probate and it devised the farm to the Illinois State Bank of Quincy in trust for the use of Alva A. Lewton and Daisy F. Lease with the remainder after the death of the survivor of them to a church at Barry, Illinois. The will was contested, but on appeal to this court its admission to probate was affirmed. Ennis v. Illinois State Bank of Quincy, 111 Ill.App.2d 71, 248 N.E.2d 534.

To pay for the farm Alice borrowed the entire $6,175.00, $3,000.00 by mortgage and $3,175.00 by personal note secured by her personally owned collateral. The sisters and brother were interested in another estate and to discharge their portion of the $3,175.00 note, each assigned to Alice their share in that estate. The record indicates this was applied on that note to the extent of $2,500.00 and that the remaining $675.00 was adjusted between Alice and Daisy. The $3,000.00 mortgage to the bank was paid by Alice and the record indicates that she paid her $750.00 of this obligation. Exhibits indicate that the balance to be paid by Robert, Daisy and Lois was $2,250.00 or $750.00 each. Subsequently Alice paid $150.00 for Daisy reducing Daisy's amount due to $600.00. There is no specific showing that this balance was ever paid either by or for the benefit of Daisy.

The evidence in the record establishes that Alice recognized an interest in this farm in her sister throughout her lifetime. This is established by accounting, letters and memoranda found in the personal effects either of Daisy in San Diego or of Alice in Illinois. A nephew testified to their signatures,

identified each of these documents and this was the only testimony produced by the plaintiff. It should perhaps be noted at this point that when Daisy had paid her share of the $3,175.00 note she was entitled to a deed from Alice under the terms of the contract. In all of the correspondence and the records which were filed, there is no direct mention either by Daisy or by Alice of a deed or a conveyance of this interest nor a request by Daisy for a deed. In 1945, Alice wrote to Daisy and told her in substance she hoped that she would not sell her interest in the farm without giving Alice a first chance to buy it and Daisy wrote back and said that she would give her first chance. This is preceded, however, by a memorandum dated in 1937 and offered in evidence which casts some doubt upon just what that interest was percentage-wise. In Exhibit No. 119, this notation appears:

> "Investment in Farm.
> Daisy invested her share of Almira's estate - amount to (i.e. Daisy's share) - $662.32.
>
> "The figure for Daisy's share is approximate. To verify see court records of estate - or my papers in Dep. Box.
>
> "Rest of farms belongs to Alice Lease - from Jan. 1, 1937 on.
>
> "Daisy has received all her share of income except 1937 crops and no interest is allowable on her investment - . I received none.
>
> Alice Lease
> Barry, Illinois-Jan. 14, 1938."

The record further establishes that Daisy returned to Illinois from San Diego in 1959, and she and her sister lived together and both

were somewhat eccentric with an unusual interest in cats. After Alice's death, a conservator was appointed for Daisy. The testimony of the nephew is that Daisy was crippled and was mentally incompetent for the last ten years of her life. In none of the accounting is there any indication that Daisy still owed Alice for the balance of the mortgage. Likewise there isn't a single word in any of the correspondence indicating that Daisy ever requested a deed or thought that she was entitled to a deed. It is correct that all of the accountings suggest that Alice divided the farm income - one fourth to Daisy and three-fourths to herself. Under plaintiff's theory, Daisy was entitled to a conveyance of an undivided one-fourth interest in the farm in September, 1930, when she paid her portion of the $3,175.00 note and interest thereon, or that in any event Daisy was entitled to a conveyance when the mortgage was paid off in 1936. Yet Exhibit No. 119 offered in evidence for the plaintiff indicates that the sole investment of Daisy in 1937 was the $662.32. Possessed of an interest and entitled to a deed for at least thirty-five years from one point of view and at least twenty-nine years from another point of view, there is not a single word in any of the letters or the correspondence which refers to the contract for the deed or whether Daisy paid the $600.00 balance of her share of the mortgage.

We recognize that where the parties are members of the same family a delay in instituting a suit is not so strictly regarded as where they are strangers to each other and a delay under proper conditions may be excused. ILP Chancery, § 121. The

division of the income of the farm between Alice and Daisy on a one-fourth - three-fourth basis is clearly justified by the contract for the deed because under that contract Daisy was at least the equitable owner of an undivided one-fourth interest. The yearly reports indicate that Daisy was constantly receiving funds in advance of settlement for a given year and this certainly suggests that she would not have been able to make any payment on this obligation out of independent income. There is nothing in the record that indicates that such payment was made out of the income from the farm. This is further borne out by the fact that Alice did not always charge Daisy for permanent improvements made from time to time on the farm and in one letter indicated to Daisy that this was because they were not absolutely necessary. In addition, the testimony of the nephew must be subjected to the closest scrutiny. His mother stands to profit as she is an heir of Daisy. The same nephew was one of the plaintiffs to contest the will of Alice. It was he who sorted out all of the documents and produced those he considered "relevant". There is nothing to show that a deed was ever made, that a deed was ever demanded or that Daisy's payment of the balance due on the real estate mortgage was ever waived, excused or forgiven by Alice. The truth in the matter is now sealed behind lips closed by death and this is one of the circumstances to be considered in determining the question of laches. Carlson v. Carlson, 409 Ill. 167, 98 N.E.2d 779. The record further shows that from time to time checks were obtained from the United States Government under the Agricultural Adjustment Act. How those claims

were filed or to whom those checks were made is not shown by this record. If the property was insured, the record does not indicate in whose name or how. While the will of Alice is not altogether without ambiguity, it seems clear that when Alice wrote her will in 1952, she apparently treated all of this real estate as belonging to her contrary to the 1945 correspondence. In her will she directed her trustee to rent and lease the real estate to the present tenant, Alva A. Lewton, and "reserving two rooms known as the parlor and north upstairs bedroom in the residence thereon for the use of my sister, Daisy F. Lease, with free access thereto as long as she shall live". She further provided that no timber be cut on the real estate except such as may be necessary for use on the farm during the lifetime of her sister unless she and the said Alva A. Lewton mutually agreed thereto. As the trial court pointed out, this suggests her belief then existing that she had the right to control and negates any thought that Daisy's occupancy of the farm was because of a tenant in common interest as owner. There is nothing to indicate that Daisy knew of this will at that time and it likewise appears Alice continued to divide the rentals as heretofore after the will was executed. In short, taking all of the circumstances of this case together, we are of the opinion that the burden is cast upon the plaintiff to show by clear and convincing evidence that specific performance is warranted. As was stated in Carlson, "this rule is especially applicable where delay in making the claim has been so long that the death of witnesses and the loss of evidence renders it impractical or impossible to make an adequate defense". Accordingly, the judgment of the trial court is affirmed.

Affirmed.

Craven, P.J. and Eovaldi, J. concur.

69-219

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 1st day of December, in the year of our Lord one thousand nine hundred and sixty-nine, within and for the Second District of Illinois:

Present -- Honorable CHARLES H. DAVIS, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable THOMAS J. MORAN, Justice
HOWARD K. KELLETT, Clerk
HARRY E. BOOTH, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On SEPTEMBER 25, 1970 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

No. 69 219 Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

IN THE INTEREST OF PAULA WALLINGFORD, RHONDA WALLINGFORD, ROBY WALLINGFORD, MARY LISA CARTER, DELBERT KENT CARTER, and GARY CARTER, Minors,	)	FILED SEP 25 1970 HOWARD K. KELLETT, Clerk Appellate Court, 2d District
GLORIA DEAN CARTER, Appellant,	)	
v.	)	Appeal from the Fifteenth Judicial Circuit in the Circuit Court of Lee County.
PEOPLE OF THE STATE OF ILLINOIS, Appellee.	)	

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

On August 28, 1969, Robert Reed, the Juvenile Court Probation Officer of Lee County, filed a verified petition that alleged that Paula Wallingford, Rhonda Wallingford, Roby Wallingford, Mary Lisa Carter, Delbert Carter and Gary Carter, the minor children of Gloria Carter, were neglected children in that ".... they are neglected as to proper and necessary support and education, and other care necessary for their well-being." The children were taken from their mother on that date and the three Wallingford children placed with Mrs. Carter's parents, Mr. and Mrs. Harold Garrison, and the three others with her brother, Gary Garrison and his wife.

A hearing was held on September 24 and it was disclosed that Gloria Carter was first married to William Wallingford and divorced

from him in 1960 after she had her three oldest children. She then married Desmond Carter and lived with him in Missouri where she had Mary Lisa and Delbert. In October of 1967, she separated from Carter and her brother and father brought her and the children to Rochelle, Illinois, where she lived with her parents until May of 1968. At that time, Mrs. Carter moved to an apartment in Rochelle where she stayed until March of 1969. In February, 1969, Mrs. Carter had her last child, Gary. In March she moved with the children to a farm house 5 miles outside of Rochelle.

Robert Reed testified that he had not made any investigation and was not acquainted with Mrs. Carter or her children at the time he signed the petition. He first visited the home on August 28 when he and a deputy sheriff went to pick up the children and stayed an hour and fifteen minutes. He observed that the children were healthy, well clothed and that the home was supplied with food. Reed subsequently made a probation report that was admitted into evidence over objection that included information furnished to Reed that Mrs. Carter lived at the farm with one Henry Dean and that the older children were upset over that situation.

Gloria Carter testified that Dean was a roomer at the house and that he paid the rent, the utilities and helped with the food expenses. She worked full time and her oldest daughter, aged sixteen, would care for the younger children while she was at work. She received no support from Wallingford or Carter and was able to keep her family together from her own efforts. Several other witnesses testified and it was uncontradicted that the farm house was large, clean and amply furnished and that the children were healthy, happy and well clothed. The school

records indicated that the children attended school regularly and were good students. There was also testimony that Gloria Carter was a good mother and cared for her children.

At the hearing, the trial court permitted the petition to be amended to include the further allegation that the children were neglected in that their ".... environment is injurious to their welfare." At the conclusion, the court found that the children were neglected in that their environment was injurious to their welfare and at a subsequent dispositional hearing the children were placed with their grandparents and uncle. This appeal followed.

The petition was brought pursuant to Section 702-4 of the Juvenile Court Act (Ill. Rev. Stat. 1967, ch. 37, sec. 702-4) wherein a neglected minor is defined as, among other, "any minor under 18 years of age... (b) whose environment is injurious to his welfare...." By implication, the order of the trial court recognized that there was no evidence whatsoever that the children were "... neglected as to proper and necessary support and education..." as originally alleged.

The Juvenile Court Act, effective since January 1, 1966, states that the purpose of the legislation is "... to secure for each minor subject hereto such care and guidance, preferably in his own home...."as will serve his welfare and the interest of the community. (Ill. Rev. Stat. 1967, ch. 37, sec. 701-2). That section further provides that the child will be removed from the custody of the parents "only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal.." The Act thus gives implicit recognition to the paramount right of the parents to the custody of their own children. In a consideration of the Family Act (since repealed) in the case of Petition of Bregar v. Seymour,

74 Ill. App. 2d, 197, 199, 200, we stated as follows:

> "It is well established that parents have an inherent right to the society and custody of their own children. . . . The State may only interfere with that inherent right where it has been forfeited by the parents, either through their misconduct, or their inability to provide proper financial or other care for their children." (citations omitted)

Section 704-6 of the Juvenile Court Act provides that the standard of proof and rules of evidence to be used in an adjudication of a petition brought under Section 702-4 (Neglected Minor) shall be the same as that required in other civil proceedings, that is, the petitioner must prove his case by a preponderance of the evidence.

The petitioner contends that by this test it was proven that the environment was injurious to the welfare of the children and that they were, therefore, neglected minors as defined by the Act. To support that contention, it is pointed out that the evidence disclosed that an unmarried man roomed in the family home, paid the rent, utilities, and a portion of the food; that Gloria Carter admitted that her youngest child was not fathered by her husband; that Rhonda, age 13, moved back with her grandparents in Rochelle after an unspecified "difference of opinion" with Dean; and that Paula, age 16, was engaged to marry a 29 year old man.

We cannot agree that these facts proved by a preponderance of the evidence that the home environment provided by the natural mother was injurious to the welfare of the children. Other than an unsubstantiated hearsay statement in the probation report that Dean "upset" the older children, there is no evidence that his presence had any adverse effect on them. Although the paternity of her last child is unexplained, there is

no evidence that the mother engaged in any immoral or improper acts in the presence of the children or that her conduct was in any way harmful to their emotional or physical well being. There is nothing in the record to indicate, except by insinuation, that Paula's engagement and Rhonda's wish to live with her grandparents, was connected with any harmful condition in the home.

On the other hand, there was considerable evidence, all uncontradicted, that the family home was large, clean and well maintained; that the children were healthy and happy; that the mother was loving and solicitous for the welfare of her children. Indeed, it is evident that the mother made great efforts to keep her family together and that she supported her children largely through her own work and with no help from either her former or present husband. Under these circumstances, we cannot say that the mother has forfeited her right to the custody of her children. The judgment of the trial court was improper and should be reversed.

REVERSED.

DAVIS, P. J. and MORAN, J., concur.

No. 53086

LOTTIE ZAGAR,

Plaintiff-Appellant,

vs.

NATHAN M. GOMBERG,

Defendant-Appellee,

AND

LOTTIE ZAGAR,

Plaintiff-Appellant,

vs.

BRUNO ZAGAR and MARY HOOTON,

Defendants-Appellees.

CONSOLIDATED

APPEAL FROM
MUNICIPAL COURT
COOK COUNTY

Honorable
Meyer Goldstein
Judge Presiding

MR. JUSTICE SMITH DELIVERED THE OPINION OF THIS COURT:

This is an appeal by the plaintiff from an order or orders dismissing a suit against a former attorney and likewise dismissing her suit against her husband and his attorney. Plaintiff prosecutes this appeal pro se and argued the matter orally in our court. Her position in this court is that both complaints state a cause of action, that the defendants should have been required to answer the complaints filed against them respectively and that the cases should have been tried on the merits.

Plaintiff was granted a decree of separate maintenance in 1957 and was awarded support money for their four minor children.

From 1959 on, various facets of the separate maintenance decree have been before the courts. In that year, she employed the defendant, Gomberg, to collect the delinquencies on the support payment. In her complaint she charges her attorney with the failure to request or obtain an increase in support from her husband when she was unemployed, failure to inform the court about the increased earnings of the defendant-husband, wilfully and maliciously allowing a

decrease of $700 on arrearages to become a part of the court order in 1963, failure to obtain a wage assignment from her husband's employer, and that by reason of these acts a life insurance policy on one of the plaintiff's sons in the sum of $2500 had to lapse because of her inability to pay the premiums. As a consequence, the plaintiff lost the insurance on the life of her son when he died as a result of a hit-and-run accident on July 9, 1963.

In her suit against her former husband and his attorney, she charges she was the beneficiary in certain life insurance policies on the life of her husband, and that under a court decree in 1965, the defendant-husband was ordered to assign these policies to her and that she, the plaintiff, was to pay the premiums. She states that her husband and his attorney wrongfully obtained a beneficial use of these policies and delayed their surrender until October, 1966. If the policies had been delivered promptly as the court order required, she could have obtained a cash loan of $3000 (the cash surrender value of the life insurance policy) and would then have been able to use the money to avoid deterioration and damage to her residence. Damages requested against her husband are $9305.60 and she likewise requests exemplary damages against her husband's attorney in such amount as the court might determine or deem proper.

It is the plaintiff's contention that her complaint states facts which establish "a possibility of recovery" and "it is sufficient that the complaint sets forth facts establishing the mere possibility of recovery". She cites Johnson v. North American Life & Casualty Co., 100 Ill.App.2d 212, 241 N.E.2d 332. We have read with considerable care the abstract of the record in this case, the various complaints, and the various orders entered by the judges in plaintiff's efforts to maintain a cause or causes of action. The difficulty with the plaintiff's citation and with her position before the several courts is that her pleadings were and are replete with conclusions, opinions, argumentative matter, evidence and irrelevant and incompetent matters. Her complaints have been dismissed several times for failure to state a cause of action and by separate judgments. She has had and sought several opportunities to file amended complaints. Such amended

complaints when filed contain basically the same allegations as the previous complaints. She has asserted that orders shown on the half sheets to have been entered by some four or five of the judges who heard various portions of this record are in error and the judges will testify that the orders shown on the half sheets to have been entered by them are orders shown to have been signed by them, but were not in fact signed or entered by them. In short, she charges that the record in this proceeding is not correct. That is not the method whereby such errors, if true, are corrected. Those records stand unimpeached.

We recognize that every citizen under our constitution should have an appropriate remedy for his injuries and wrongs. We have established rules, procedures and guidelines for the accomplishment of such a result. The orderly administration of justice requires a reasonable adherence to those guidelines and rules. We cannot say that any of the charges in either of these complaints are within the perimeter of such rules and they actually charge non sequiturs so far as proximate cause is concerned. The plaintiff has had several attorneys. She has been before several courts and judges. She has had several opportunities to file and state a cause of action. There has to be an end to litigation somewhere. The right to amendment and the opportunity to properly state a cause or causes of action is not limitless. It is clear that any nexus between the conclusionary misfeasances, nonfeasances or malfeasances and causes of action and the damages alleged to have been sustained as a result are fictional rather than factual.

Accordingly, the judgments of the trial court dismissing these complaints should be and they are hereby affirmed.

Affirmed.

Craven, P.J. and Trapp, J. concur.

70-25

LOUIE E. TRIPOD VS. KELCE ARRINGTON

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the Year of our Lord one thousand nine hundred and seventy, within and for the Third District of Illinois:

Present—

HONORABLE HOWARD C. RYAN, Presiding Justice

HONORABLE ALLAN L. STOUDER, Justice

HONORABLE JAY J. ALLOY, Justice

JOHN E. HALL, Clerk

WAYNE E. HESS,
~~FLOYD~~ L. ~~CONKLING~~, Sheriff

BE IT REMEMBERED, that afterwards on OCTOBER 9, 1970 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

NO. 70-25

IN THE

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1970

LOUIE W. TRIPOD and VIDA L. TRIPOD, Plaintiffs-Appellees, vs. KELCE ARRINGTON and AMELIA MILLER, Conservator of the Estate of CLARA K. THOMAS, an Incompetent, Defendants-Appellants.	Appeal from the Circuit Court of Tazewell County, Illinois Honorable Ivan L. Yontz Presiding Judge

RYAN, PJ.

Abstract

Plaintiffs brought this action for declaratory judgment and injunction to establish their right to the use of a ten foot wide driveway, of which, approximately three feet is on plaintiffs' property and approximately seven feet is on the adjoining lot which belongs to defendants. Plaintiffs based their complaint on a claim of over twenty years adverse use pursuant to Chapter 83, Section 1, Illinois Revised Statutes, [redacted] which reads:

> "No person shall commence an action for the recovery of lands, nor make an entry thereon, unless within twenty years after the right to bring such action or make such entry first accrued, or within twenty years after he or those from, by, or under whom he claims, have been seized or possessed of the premises, except as now or hereafter provided in subsequent sections of this Act."

The case was heard by the court without a jury and an order was entered finding for plaintiffs and enjoining defendants from interfering with plaintiffs' use of the driveway.

Although defendants offered no witnesses, they have appealed claiming that plaintiffs failed to establish a prima facie case. That is to say, defendants allege that plaintiffs failed to prove that their use of the driveway was for twenty years continuous, adverse, uninterrupted, under a claim of right and with the knowledge and acquiescence of the owners.

Three different witnesses stated their knowledge of the existence of the driveway for over forty years. There was testimony that though the joint use of the driveway was protested on more than one occasion, that the plaintiffs or their predecessors persisted in using it, thus tending to show acquiescence on the part of defendant and defendant's predecessors and the adverse nature of plaintiff's assertion. The mere fact that the driveway may not have been used frequently does not mean that the claim and possession were not adverse. The testimony established the existence of the driveway and the use of it in connection with the use of plaintiff's property. Did plaintiffs establish at least a prima facie case as to all of the elements necessary to establish a prescriptive right? We believe that they did. There is substantial evidence in this case to support the finding of the trial court and no evidence at all to controvert that offered by plaintiffs.

The question of whether or not there is an adverse use so as to give rise to a prescriptive easement is almost wholly a question of fact. Rush v. Collins, 366 Ill. 307. The findings of the trial court in this case are supported by the evidence. Since such findings are sufficient in law and are not against the manifest weight of the evidence, they should not be disturbed. Ritter v. Janson, 80 Ill. App2d 169.

For the reasons stated, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED

STOUDER, J concurs.

ALLOY, J concurs.

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